

NO. PD-0064-20

IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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NO. 05-19-00034-CR

ON APPEAL FROM THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

JUAN CARLOS FLORES

V.

THE STATE OF TEXAS

Cause No. 069074
In the 15th District Court of
Grayson County, Texas

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 68.4, the appellant hereby lists all parties to this appeal with the names of all trial and appellate counsel:

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

The court did not grant oral argument. In the event the court determines oral argument is appropriate, the appellant requests the opportunity to present oral argument.

STATEMENT OF THE CASE

The appellant was charged with the offense of Aggravated Robbery. (CR at 12). At trial, the appellant entered a plea of “not guilty.” The appellant was found guilty by the jury. (RR at 101). The trial court sentenced appellant to fifteen (15) years confinement TDCJ-ID. (RR at 101). On appeal, the Fifth Court of Appeals affirmed the conviction.

The appellant petitioned this court for review on February 20, 2020. This court granted review on June 24, 2020.

QUESTION PRESENTED FOR REVIEW

The court of appeals erred where it held the evidence to be sufficient to prove the use of a deadly weapon where the alleged weapon was not used in a way that was capable of causing death or serious bodily injury.

STATEMENT OF FACTS

Nanu Shapakota was working at a convenience store owned by her and her husband. (IV RR at 123, 127). She was working in the back of the store when an individual came in and asked her to come to the front of the store. The individual's face was covered and he was holding something she described to be "like" a gun in his hand. (IV RR at 127). The individual told her she had one minute to give him all of the money she had in the register. He put a bag on the counter and Shapakota placed all of the money from the register in the bag. After the individual left, Shapakota called the police. (IV RR at 128).

Shapakota believed the item in the individual's hand to be a gun until she later watched the security footage with law enforcement. (IV RR at 128-129). It was determined the object was a drill which had been covered in sacks. (III RR at 7). Shapakota stated the individual only held the object as if it were a gun but did not strike at her with it or attempt to hit her. (IV RR at 137). When asked by the prosecutor if she would still be afraid knowing it was a drill, she responded that, "It can poke, he can turn it on me." (IV RR at 133).

Detective Mackay testified at trial, when asked how a drill could be a deadly weapon, that "you could use it as a blunt object. You hit somebody with it. You could stab somebody with it. You could drill them with it." (V RR at 49).

SUMMARY OF THE ARGUMENT

The appellant was convicted of aggravated robbery where he was alleged to have used a drill as a deadly weapon in the course of committing robbery. The evidence at trial showed the drill was covered in a sack so that the store clerk would believe the drill to be a gun. There was no evidence the appellant struck the clerk or attempted to strike the clerk—it was simply held in such a way that the clerk was to believe it was a gun. Because the record is void of any evidence of the appellant's intent to use the drill in such a way it was capable of causing death or serious bodily injury, the evidence was insufficient to show the drill was a deadly weapon.

ARGUMENTS AND AUTHORITIES

1. Aggravated robbery

A person commits the offense of aggravated robbery if he commits a robbery and uses or exhibits a deadly weapon. TEX. PENAL CODE § 29.03(a). The appellant was alleged to have committed the offense of aggravated robbery by, “while in the course of committing theft of property and with the intent to obtain or maintain control of said property, intentionally or knowingly threaten to place [victim] in fear of imminent bodily injury or death and the defendant did then and there use or exhibit a deadly weapon, to wit: a drill.” (CR at 12).

a. Deadly weapon defined

A deadly weapon is “(A) firearm or anything manifestly designed, made, or adapted for the purpose of inflicting serious bodily injury; (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” TEX PENAL CODE § 1.07(17).

A drill, the alleged weapon in the present case, is not a firearm, nor is it manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury. TEX PENAL CODE § 1.07(17)(A). Additionally, there was no evidence the drill was in any way adapted for the purpose of inflicting death or serious bodily injury. *Id.* Therefore, for the evidence to be sufficient for the jury to find the drill to be a deadly weapon, it must show that in its use or intended use it was capable of causing death or serious bodily injury. TEX PENAL CODE § 1.07(17)(B).

b. “Use or exhibit” a deadly weapon language

This court has also held that the “uses or exhibits a deadly weapon” language in the aggravated robbery statute means that if an object is a deadly weapon, it is sufficient that the deadly weapon “facilitated the associated felony.” In analyzing the “uses or exhibits a deadly weapon” language contained in the aggravated robbery statute, in looking at similar language in Article 42.12 § 3g(a)(2), this court has defined that to mean employing a weapon in any manner that “facilitates the associated felony.” *Patterson v. State*, 769 S.W.2d 938, 941 (Tex.Crim.App.1986). This court has also held that, given the similarity of the language between 42.12 § 3g(a)(2) and the aggravated robbery statute, the “facilitates the associated felony” language is relevant to interpreting the aggravated robbery section. *McCain v. State*, 22 S.W.3d 497, 502 (Tex.Crim.App.2000).

However, before determining whether an alleged deadly weapon “facilitated an associated felony,” it must first be determined whether the object is a deadly weapon under the specific facts of the case. *Id.* If that question is answered in the affirmative, only then should a court move to determine whether that object was used or exhibited during the offense. *Id.*

This court held in *McCain* that objects used to threaten deadly force are, in fact, deadly weapons. *Id.* at 503. The reasoning is that the statute does not say “anything that in the manner of its use or intended use causes death or serious bodily injury,” but instead says “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. TEX. PENAL CODE § 1.07(a)(17)(B) (emphasis added). *Id.* The plain language of the statute does not require the actor actually intend death or serious

bodily injury; an object is a deadly weapon if the actor *intends a use of the object* in which it would be capable of causing death or serious bodily injury. *Id* (emphasis added).

c. The evidence is insufficient to show an intended use of the drill which would be capable of causing death or serious bodily injury

For legal sufficiency purposes, the question is whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The evidence in the present case is insufficient to prove the perpetrator intended the use of the drill in a way which it would be capable of causing death or serious bodily injury.

The perpetrator entered the convenience store and pointed what the clerk believed to be a gun at her and requested she provide him the money from the register. What the clerk believed to be a gun turned out to be a drill covered with sacks. The clerk testified the perpetrator never struck, or attempted to strike, her with the drill. The robbery was quick and the perpetrator never raised his voice. The perpetrator told the clerk he did not want to hurt her. He never threatened to shoot her, strike her, or otherwise use the drill against her.

The act of placing the sack on the drill is evidence of the perpetrator’s desire for the clerk to believe the drill was a firearm. This does not rise to sufficient evidence the drill was a deadly weapon as defined by § 1.07 (a)(17)(B). While this court has held the deadly weapon statute does not require the actor actually intend death or serious bodily injury, sufficient evidence of a deadly weapon does require proof the actor intends a use of the

object in which it would be capable of causing death or serious bodily injury. *McCain v. State*, 497 at 503. The record in the present case is void of any such evidence the perpetrator intended the use of the drill in a way that would cause death or serious bodily injury.

In cases where objects which were not deadly weapons per-se but were used to make the victim believe the object was a deadly weapon, lower courts have held the evidence to be insufficient to prove the object was a deadly weapon. In *Hernandez v. State*, the Texarkana Court of Appeals held the evidence of a deadly weapon insufficient where, during a kidnapping, the appellant used a toy pistol which the victims believed to be a firearm. See *Hernandez v. State*, 332 S.W.3d 664 (Tex.App.-Texarkana 2010). As in the present case, the court in *Hernandez* noted the toy gun was “neither used to strike [victim], nor was there any evidence suggesting either that Hernandez threatened to use or intended to use the toy in that manner.” The court went on to note, “[victim] and her husband indicated only that Hernandez pointed the gun at them as if he was going to shoot them with (what eventually turned out to be a toy) gun.” *Id.* at 667-668. The court concluded, “because the use and manner of *intended use* (i.e., pointing and threatening as if to shoot) was not a use of the toy capable of causing death or serious bodily injury, we find such evidence was legally insufficient to allow a jury to infer the toy was a deadly weapon.” *Id.* at 668 (emphasis added). See also *Pena Cortez v. State*, 732 S.W.2d 713 (Tex.App.-Corpus Christi-Edinburg 1987).

2. Court of appeals failed to properly analyze whether the drill was a deadly weapon under the facts of the case

The court below acknowledged this court's two-step process in determining whether a deadly weapon was "used" or "exhibited" requires the court first to determine if the object is a deadly weapon and then to determine if the weapon was used or exhibited. *Flores v. State*, 05-19-00034-CR, 2019 WL 6907076. See *McCain v. State*, 22 S.W.3d at 502-03. The court, however, failed to analyze whether the drill is actually a deadly weapon under the facts of this case. Instead, the court essentially reasoned that because the drill was used to facilitate the crime, it must be a deadly weapon. Instead of looking at the perpetrator's intent of the use of the drill, as required by this court in *McCain*, the court below simply concluded, without further reasoning "appellant used and exhibited the drill in such a way that it was capable of causing death or serious bodily injury, and he used it to facilitate the robbery." *Flores v. State*, 05-19-00034-CR, 2019 WL 6907076. The appellant did not use the drill in a way that it was capable of causing death or serious bodily injury—holding it and pointing it at the clerk would pose no actual risk of causing death or serious bodily injury. To find the drill to be a deadly weapon, the court below would need to have looked at the evidence of intent of the use of the drill. In failing to do so, the court did not engage in the first step of the two-step process required by this court in *McCain*.

When looking at the facts of this case, as required by this court in *McCain*, the evidence is not sufficient to prove the drill was a deadly weapon. The record is void of any evidence the appellant intended to use the drill in a way it was capable of causing death or seriously bodily injury—the only evidence of his intent was that he intended for the clerk

to believe it was a firearm. Because the drill does not meet the definition of a deadly weapon under § 1.07 (a)(17)(B) this court need not address whether the drill “facilitated the associated felony.” Because the drill was not a deadly weapon, the evidence is insufficient to support the conviction and the judgment of the trial court should be reversed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court reverse the court of appeals and enter a judgment of acquittal. Appellant prays for any such further relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLAANCE

This petition complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 2,045 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/ Jeromie Oney

Jeromie Oney

CERTIFICATE OF SERVICE

I do hereby certify that on the 10th day of August, 2020 a copy of the Appellant's Petition for Discretionary Review was served to:

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/s/ Jeromie Oney

Jeromie Oney

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